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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/784,597	10/12/2004	Joseph P. Errico	SPINE 3.0-437 CIPCIPCIPCI	8309
51640 SPINE MP LERNER, DAVID, et al. 600 SOUTH AVENUE WEST WESTFIELD, NJ 07090	7590 10/07/2010		EXAMINER PELLEGRINO, BRIAN E	
			ART UNIT 3738	PAPER NUMBER
			MAIL DATE 10/07/2010	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/784,597

**Applicant(s)**

ERRICO ET AL.

**Examiner**

Brian E. Pellegrino

**Art Unit**

3738

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 04 January 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-11, 13, 15-18 and 20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-11, 13, 15-18 and 20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB-06)  
Paper No(s)/Mail Date 1/4/10
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 01/04/10 has been entered.

### ***Response to Arguments***

Applicant's arguments with respect to claims 1,18 have been considered but are moot in view of the new ground(s) of rejection.

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1,3-7,10,11,13,18,20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Paponneau (2003/176925) in view of Boriani et al. (6159211). The examiner is interpreting the claimed elements "integrally coupled" in this way: elements that are *formed as a unit with other parts* as defined by Meriam-Webster Online Dictionary. Claims in a pending application should be given their broadest

reasonable interpretation. *In re Pearson*, 181 USPQ 641 (CCPA 1974). See also *In re Morris*, Fed. Cir. 1997 127 F3d 1048, 1054,1055. Paponneau discloses (Fig. 1) apparatus for preparing an intervertebral space with two baseplates **24**, **26** and can be considered integrally coupled via cylindrical trunk **22**. Fig. 2 shows clips to "integrally couple" the plates together. Since the plates will not separate once connected to the trunk via the snap connections the baseplates are "integrally coupled" to the trunk. Fig. 3 show the baseplates include a plurality of engagement holes **64A-C**, **66A-C** extending into the baseplate to a direction substantially perpendicular to the plurality of surgical approach directions. Regarding claim 4, Fig. 8A illustrates the plates can be angled with respect to one another and can be approximately 15 degrees. Regarding claims 6,7, since there is space about the trunk because it is smaller in width than the plates it forms a "groove" and is thus annular. With respect to claims 10,11, the apparatus is fully capable of being used in any of the surgical approach directions, such as an anterior or anterior-lateral approach. Regarding claim 20 since the baseplates have a thickness, it can be said that there is a surface facing an anterior surgical approach direction and two anterior-laterally facing surfaces extending perpendicular to the anterior-lateral approach. However, Paponneau does not disclose the plates having an anterior facing surface extending perpendicular to the anterior surgical approach and two anterior-laterally facing surfaces each extending at an angle from the anteriorly facing surface. Boriani et al. teach (Fig. 19) a plate having an anterior facing surface **88** extending perpendicular to the anterior surgical approach and two anterior-laterally facing surfaces each extending at an angle from the anteriorly facing surface. Each of the faces have

engagement structure for one of the surgical approach directions, col. 4, lines 27-31 of Boriani. It would have been obvious to one of ordinary skill in the art to modify the surface of the baseplates of Paponneau and incorporate an anterior facing surface extending perpendicular to the anterior surgical approach and two anterior-laterally facing surfaces each extending at an angle from the anteriorly facing surface as taught by Boriani et al. such that it gives the surgeon the ability to orient the structure from different angles giving greater versatility. With respect to claim 13 Boriani can be said have an anterior facing surface angled at "approximately 33.4 degrees" with respect to each of the anterior-laterally facing surfaces.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Paponneau (2003/176925) in view of Boriani et al. '211 as applied to claim 1 above, and further in view of Kuras (6607558). Paponneau in view of Boriani et al. is explained supra. However, Paponneau as modified with Boriani fail to disclose the contour of the outward facing surface of the baseplates to have a contour of a dome. Kuras teaches (Figs. 1-3) a spinal device that has two upper and lower support structures **20, 40** with convex or domed outward facing surfaces **22, 42** for engaging the disc space. It would have been obvious to one of ordinary skill in the art to use a convex or domed contour as taught by Kuras for the baseplates of Paponneau as modified with Boriani et al. such that it more closely matches the contour of the vertebrae surface that the apparatus is to engage.

Claims 8, 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Paponneau (2003/176925) in view of Boriani et al. '211 as applied to claim 6 above, and

further in view of Baumgartner (5370697). Paponneau in view of Boriani et al. is explained supra. However, Paponneau as modified with Boriani fail to disclose the floor of the groove is narrower than an opening of the groove or the groove floor being ridged. Baumgartner teaches (Fig. 1a) a spinal device that has two upper and lower support structures **2, 3** with an inner "groove" having a floor with ridge **21** for holding the trunk component **5**. Baumgartner additionally teaches (col. 2, line 58) a narrower profile for the floor of the "groove". It would have been obvious to one of ordinary skill in the art to modify the baseplates and use a ridged floor as taught by Baumgartner in the baseplates of Paponneau as modified with Boriani such that it more effectively retains the trunk between the two baseplates.

Claims 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Paponneau (2003/176925) in view of Boriani et al. '211 as applied to claim 1 above, and further in view of Nishijima et al. (5899941). Paponneau in view of Boriani et al. is explained supra. However, Paponneau as modified with Boriani fail to disclose the apparatus baseplates having a combination of different width and depth dimensions. Nishijima et al. teach (Figs. 3a,3b) apparatus for a spinal disc space with the upper and lower baseplates **2, 3** with different width and depth dimensions. Nishijima also teaches that one of the baseplates is to have the central structure integral with the plate, col. 1, lines 51-53. It would have been obvious to one of ordinary skill in the art to simplify the apparatus for the spinal space by making an integral trunk with the baseplate as taught by Nishijima et al. for the apparatus of Paponneau as modified with Boriani et al. such that it reduces the cost of manufacturing by lowering the number of components that

would have to be molded. With respect to claims 16,17 Paponneau does not explicitly disclose the width dimension in a range up to 40mm. Boriani et al. teach that the width of the implant body is 40mm, col. 5, lines 17-19. It would have been obvious to one of ordinary skill in the art to use a width of 40mm for the plates as taught by Boriani et al. in the baseplate of Paponneau such that the baseplates have a sufficient dimension to accommodate a lumbar region as taught by Boriani. Regarding claim 17 it would have been obvious to one of ordinary skill in the art at the time the invention was made to use a depth having a range between 14-18mm, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brian E. Pellegrino whose telephone number is 571-272-4756. The examiner can normally be reached on M- F (9am-5:30pm).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott can be reached on 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

TC 3700  
/Brian E Pellegrino/  
Primary Examiner, Art Unit 3738